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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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No. 100-¹
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1. Introduction

2. The *Report and Order* made allotment changes at thirteen communities in Alabama, Mississippi and Tennessee in response to a petition for rule making filed by Capstar and others. Only one of those thirteen allotments is challenged. In the relevant portion of the *Report and Order*, the Commission had to choose between two competing proposals. First, Capstar had proposed deleting Channel 252A at Pulaski, Tennessee, and allotting Channel 252C1 to Ardmore, Alabama as Ardmore's first local service, with a corresponding modification to the license of Station WKSJ-FM, Pulaski. In order to provide clear spacing for the Ardmore allotment, Capstar had proposed the substitution of Channel 278A for Channel 252A at Scottsboro, Alabama. Second, STG had counterproposed the new allotment of Channel 278A to New Hope, Alabama as that community's first local service. Since the Scottsboro and New Hope proposals were in conflict, the Commission compared the two proposals under its FM priorities. The Commission's comparison clearly favored New Hope over Ardmore because of its greater population. Accordingly, the Commission allotted Channel 278A to New Hope and denied the Ardmore and Scottsboro proposals.

3. On October 15, 2002, STG, joined by PBT, the licensee of WKSJ-FM, Pulaski, Tennessee, petitioned for reconsideration of that portion of the *Report and Order* that allotted Channel 278A to New Hope over Capstar's Ardmore proposal. According to the Petition for Reconsideration, STG is no longer interested in a channel at New Hope. Instead, STG has entered into an option agreement with PBT under which STG would purchase WKSJ-FM conditioned upon the finality of a Commission order rescinding the New Hope allotment and granting the Ardmore allotment as initially proposed. Accordingly, STG and PBT request that the Commission rescind the New Hope allotment and grant the Ardmore and Scottsboro allotments instead.

II. Rescinding the New Hope Allotment in Favor of the Ardmore and Scottsboro Allotments would Violate Section 307(b) of the Communications Act.

4. The Commission should deny the Petition for Reconsideration because rescinding the New Hope allotment in favor of the Ardmore allotment would violate Section 307(b) of the Communications Act. Pursuant to its statutory mandate under Section 307(b), when faced with conflicting proposals the Commission compares those proposals under its well-established priorities. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In this case, both competing proposals would have advanced priority (3), provision of a first local service. When choosing between two competing proposals under priority (3), the population of the proposed new community of license is the deciding factor. *See Elberton and Lavonia, Georgia*, 15 FCC Rcd 12571 (2000); *Blanchard, Louisiana and Stephens, Arkansas*, 8 FCC Rcd 7083 (1993). New Hope, with a 2000 population of 2,539, is more than twice the size of Ardmore (2000 pop. 1,034). Accordingly, the Commission preferred New Hope over the Ardmore and Scottsboro allotments.

5. Having made a public interest determination pursuant to its Section 307(b) mandate, the Commission cannot reverse that determination at the whim of private parties. *See Cambridge and St. Michaels, Maryland*, 17 FCC Rcd 20425 (2002) (denying petition to dismiss allotment filed by original petitioner). The cases STG cites in which the Commission has withdrawn a proposed allotment at the request of the petitioner are inapposite. In *Mt. Pleasant and Bogata, Texas*, 16 FCC Rcd 7858 (2000), the Commission, on reconsideration, rescinded an allotment at Bogata due to failure of any party to express an interest in the channel. It did not reinstate the Mt. Pleasant allotment that it had earlier determined to be inferior to Bogata. In *Detroit, Howe, and Jacksboro, Texas*, 15 FCC Rcd 19648 (2000), the Commission stated the general principle that it will not make an allotment in the absence of an expression of interest.

Here, Buffalo River Broadcasters has expressed an interest in Channel 278A at New Hope. *See* Partial Opposition to Petition for Reconsideration (filed Nov. 27, 2002). In addition, Clear Channel hereby states that it intends to apply for Channel 278A at New Hope and construct the facilities if its application is granted.' STG cites no case in which the Commission rescinded an allotment in favor of an inferior proposal in the presence of an expression of interest. Indeed, in order to replace the New Hope allotment with the Ardmore allotment, STC would, at a minimum, have to set forth the overriding public interest benefits of its proposal. *See Cambridge and St. Michaels, Maryland, supra*

111. STG's Withdrawal of its Expression of Interest in New Hope Violates the Anti-Abuse Provision, Section 1.420(j), of the Commission's Rules.

6. In addition, there is another equally compelling reason to deny the Petition for Reconsideration. STG and PBI furnished affidavits pursuant to Section 1.420(j) certifying that no consideration was given or received in exchange for the withdrawal of STG's expression of interest in the New Hope allotment. However, the withdrawal does not comply with Section 1.420(j). In fact, it is an abuse of the Commission's processes of exactly the kind that Section 1.420(j) was designed to deter. To understand why requires digging a little deeper below the surface.

7. Section 1.420(j) prohibits a party to an allotment proceeding from withdrawing an expression of interest in exchange for compensation in excess of its legitimate and prudent expenses. 47 C.F.R. § 1.420(j). In the absence of this rule, the Commission was concerned that

The Commission's policy not to accept a late-filed expression of interest in a contested proceeding does not apply to bar these expressions of interest in the New Hope allotment. As the Commission explained in *Arnold and Columbia, California*, 13 FCC Rcd 18894 (1996), that policy ensures that the Commission's resources are not expended in vain upon a channel that will lie vacant. Once a proceeding is complete and a channel is allotted, however, any subsequent expression of interest in the channel serves to prevent its deletion. *See Brookline, Missouri*, 16 FCC Rcd 8698 (2001); *Arnold and Columbia, California, supra*.

a party that had filed a counterproposal could “ransom the withdrawal of its conflicting filing and thereby profit from abuse of our processes.” *Abuses of the Commission’s Processes*, 5 FCC Rcd 3911 (1990). Ransom is what STG’s Petition for Reconsideration is all about.

8. Currently, WKSJ-FM, a Class A station in Pulaski, Tennessee, places a 60 dBU contour over an area of approximately 2,500 sq. km. largely confined to rural Giles County, Tennessee. If WKSJ-FM is relocated from Pulaski to Ardmore on Channel 252C1, its 60 dBU contour area would increase by 13,900 square kilometers and its signal would be received by an additional 700,000 people. Indeed, the 60 dBU contour of the improved facility would include nearly all of the Huntsville and Decatur, Alabama Urbanized Areas. Obviously, the relocation would result in a substantial increase in the station’s value, likely measured in millions of dollars. However, as things currently stand, STG holds the key to unlocking that value. By filing for the New Hope channel, STG put itself into the position of determining WKSJ’s fate. If STG does not withdraw its expression of interest, WKSJ-FM stays in Pulaski, and has little or no chance of improving its signal. If STG withdraws its expression of interest, WKSJ-FM moves to Ardmore and enjoys a multimillion-dollar increase in value. PBI, the licensee of WKSJ-FM, which should be the beneficiary of that increase in value, cannot capture it. PBI cannot sell the station as an Ardmore facility to any buyer except STG (because STG would refuse to withdraw and the station would stay in Pulaski). Nor can PBI bargain with STG for the full value of the station as an Ardmore facility, because STG can unilaterally refuse any offer. Essentially, STG can force PBI to accept any price for the station above its current value, capturing the entire multimillion-dollar increase for itself.

9. As discussed above, STG’s windfall resulted from its filing of a counterproposal for New Hope. We need not speculate upon whether STG ever had a bona fide interest in a New

Hope allotment. What matters now is that STG's withdrawal of its expression of interest violates the anti-abuse rule, Section 1.420(j). It violates that rule because, despite the parties' certifications to the contrary, STG would receive substantial consideration in exchange for its withdrawal. The consideration is in the form of the bargain-basement price it has agreed to pay for WKSR-FM as an Ardmore facility.

10. The approximate amount of the consideration STG would receive for the withdrawal of its expression of interest can be measured, and it amounts to more than two million dollars. In July, 2002, Capstar and PBI negotiated the terms of a stock purchase by Capstar of PBI conditioned upon the station's reallocation to Ardmore, similar to the option agreement between STG and PBI. The purchase price agreed upon was \$4,500,000. See Declaration of Jerome L. Kersting, attached hereto as Exhibit A. That transaction was not consummated, but the reason it was not consummated had nothing to do with the purchase price, which was acceptable to both Capstar and PBI. *Id.* By contrast, the purchase price STG has agreed to pay for the same stock under the same conditions three months later is \$2,205,000. Therefore, the consideration STG would receive in exchange for the withdrawal of its expression of interest is \$2,295,000.

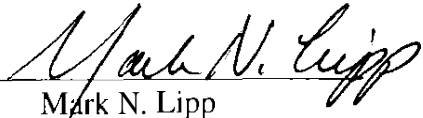
IV. Conclusion

11. While a ransom of more than two million dollars in exchange for the withdrawal of a counterproposal is more than enough reason to deny the Petition for Reconsideration, as discussed above it should also be denied on public interest grounds. The Commission has already made a finding pursuant to Section 307(b) that an allotment at New Hope better advances the public interest than an allotment at Ardmore. That finding still stands. The public interest would be disserved by the rescission of the New Hope allotment. Only STG's private interest would be served thereby.

WHEREFORE, for the foregoing reasons, the Commission should deny the Petition for Reconsideration

Respectfully submitted,

CAPSTAR TX LIMITED PARTNERSHIP

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Its counsel

December 4, 2002

EXHIBIT A

Declaration of Jerome L. Kersting

Under penalty of perjury, I, Jerome L. Kersting, a principal of Capstar TX Limited Partnership ("Capstar"), declare as follows:

1. On or about July 14, 2002, Capstar was in negotiations with the shareholders of Pulaski Broadcasting, Inc. ("PBI"), licensee of WKSR-FM, Pulaski, Tennessee, looking towards the purchase by Capstar of the stock of PBI.

2. Among the terms negotiated by the parties was a purchase price of \$4,500,000 to be paid by Capstar for the stock of PBI excluding any assets unrelated to WKSR-FM. Consummation of the transaction was to have been conditioned upon the grant and finality of an order of the FCC granting a change in community of license of WKSR-FM to Ardmore, Alabama on Channel 251C2.

3. At that time, Capstar was satisfied that the purchase price of \$4,500,000 represented good value for the stock of PBI, provided that the other terms and conditions of the transaction were met.

4. The parties did not enter into any agreement regarding the transaction, and Capstar is no longer interested in the purchase of WKSR-FM.

Capstar TX Limited Partnership

By: 

**Jerome L. Kersting
Senior Vice President**

Date: 12/3/02

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 4th day of December, 2002 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "OPPOSITION TO PETITION FOR RECONSIDERATTON" to the following:

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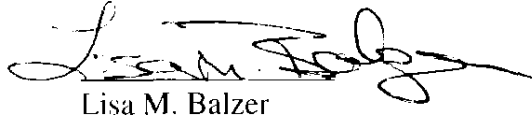
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